

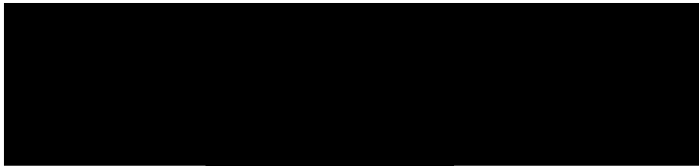


U.S. Citizenship
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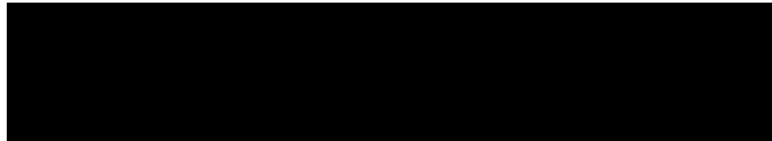
Office: VERMONT SERVICE CENTER

Date: APR 02 2007

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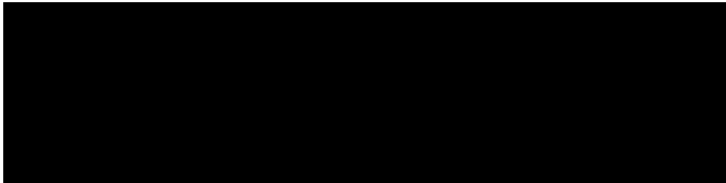
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mai Plummer

2 Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information technology business. It seeks to employ the beneficiary permanently in the United States as a senior software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence. Essentially, counsel requests that we consider the petitioner's cash balances in addition to its net current assets. As net current assets already include cash, counsel has not overcome the director's basis of denial.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on May 24, 2002. The proffered wage as stated on the Form ETA 750 is \$79,019 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. The petitioner, however, seeks to substitute the beneficiary of this petition for the original beneficiary listed on the alien employment certification. We note that the original beneficiary, [REDACTED], claimed to have worked for the petitioner since October 2000.

On the petition, the petitioner claimed to have an establishment date in 1996, a gross annual income of \$3,312,553, a net income of \$52,272 and 30 employees. In support of the petition, the petitioner submitted its Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns for 2002 and 2003.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 4, 2006, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also requested the beneficiary's Forms W-2 Wage and Tax Statements for any years worked.

In response, the petitioner submitted its IRS Form 1120 U.S. Corporation Income Tax Return for 2004. It also submitted payroll documentation reflecting that it paid the original beneficiary, [REDACTED] \$71,514 in 2002, \$17,500 in 2003, \$12,233 in 2004 and \$20,717 in 2005. Finally, the petitioner submitted the beneficiary's 2005 Form W-2 reflecting wages of \$9,374.99 and pay statements for November 2005 through March 2006. The 2006 pay statements reflect wages of \$3,333.33 every two weeks. These biweekly payments annualize to \$86,666.58.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on August 15, 2006, denied the petition.

On appeal, counsel asserts that the petitioner's year-end cash, in addition to its net current assets, establishes its ability to pay the proffered wage. The petitioner submits bank statements and its 2005 income tax return.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the *full* proffered wage in any year. Nevertheless, the petitioner did pay the original beneficiary in 2002 through 2005 and paid the beneficiary some wages in 2005. The difference between the proffered wage and the wages paid to [REDACTED] and the proffered wage amounts to \$7,505 in 2002, \$61,519 in 2003, \$66,786 in 2004 and \$58,302 in 2005. In 2005, the petitioner also paid the beneficiary \$9,374.99, reducing the difference between wages paid and the proffered wage to \$48,927.01.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.

Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The tax returns reflect the following information for the following years:

	2002	2003	2004	2005
Net income	\$20,428	\$52,272	\$17,827	\$16,340
Current Assets	\$14,181	\$44,085	\$46,574	\$89,824
Current Liabilities	\$0	\$0	\$0	\$80,000
Net current assets	\$14,181	\$44,085	\$46,574	\$9,824

The difference between the proffered wage and the wages paid to the original beneficiary in 2002 is \$7,505. In 2002, the petitioner shows a net income of \$20,428. The petitioner has, therefore, shown the ability to pay the proffered wage during 2002.

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The difference between the proffered wage and the wages paid to the original beneficiary in 2003 is \$61,519. In 2003, the petitioner shows a net income of only \$52,272, net current assets of only \$44,085 and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets.

The difference between the proffered wage and the wages paid to the original beneficiary in 2004 is \$66,786. In 2004, the petitioner shows a net income of only 17,827, net current assets of only 46,574 and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets.

The difference between the proffered wage and the wages paid to the original beneficiary and the current beneficiary in 2005 is \$48,927.01. In 2005, the petitioner shows a net income of only \$16,340, net current assets of only \$9,824 and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets.

Counsel's reliance on the year-end balances in the petitioner's bank account in addition to the petitioner's net current assets is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L considered above in determining the petitioner's net current assets. Thus, the petitioner has not demonstrated that any other funds were available to pay the proffered wage.

While we withdraw the director's determination that the petitioner lacked the ability to pay the proffered wage in 2002, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage subsequently during 2003, 2004 and 2005. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

On a final note, while not a basis of denial, the petitioner appears to have moved from New York to New Jersey. Specifically, the record contains the copy of the notice of denial sent directly to the petitioner. The notice was returned to the director by the post office as undeliverable. A forwarding address is listed. The same address is listed as the petitioner's address on its 2005 income tax return. The petitioner has not provided any documentation relating to whether the alien employment certification, issued based on the petitioner's New York, New York address, is valid for the petitioner's Edison, New Jersey address. This issue would need to be resolved in any future proceedings based on this alien employment certification.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.